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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 AARON MORROW,

10 Plaintiff,

03:06-CV-0362-LRH (RAM)

11 vs.

ORDER

12 CITY OF RENO FIRE DEPARTMENT,

13 Defendant.

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15 Presently before this court is Defendant's, City of Reno Fire Department, motion to  
16 dismiss (#4<sup>1</sup>) brought pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff, Aaron  
17 Morrow, has filed an opposition (#5), to which Defendant has replied (#6).

18 **FACTS AND PROCEDURAL HISTORY**

19 This matter arises out of Plaintiff's termination from Defendant's employ. Plaintiff is a  
20 Native American who was selected for hiring as a firefighter off the Native American List of  
21 Recruits.

22 Plaintiff alleges that, while a recruit, he was subjected to a hostile workplace based on his  
23 ethnicity. Plaintiff claims he was wrongly accused of urinating outside of the Academy and  
24 drinking alcohol in his uniform. As a result of this accusation Plaintiff claims he was forced to  
25 attend a meeting at the Training Center where he received blatantly hostile looks from other  
26 firefighters before being placed on administrative leave. Plaintiff was ultimately reinstated and  
27 completed his training.

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<sup>1</sup> References to (#XX) refer to the court's docket.

1 After completing his training Plaintiff alleges he received evaluations indicating he was  
2 performing solidly during his first probationary assignment. However, during his second  
3 probationary assignment Plaintiff alleges he received a baseless and inappropriate evaluation.  
4 When Plaintiff went to complain about this evaluation he realized that the Fire Chief had been  
5 overseeing his probationary assignments in violation of department protocol. Further, Plaintiff  
6 was told he was failing despite his best efforts.

7 Plaintiff was terminated on July 29, 2005. He subsequently filed a lawsuit against  
8 Defendant. Defendant has now moved to dismiss that suit.

### 9 LEGAL STANDARD FOR MOTION TO DISMISS

10 In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the  
11 court asks only whether the pleadings are sufficient to establish a claim, not whether the plaintiff  
12 could find evidence to support the pleadings. *See e.g., Lee v. City of Los Angeles*, 250 F.3d 668,  
13 688 (9th Cir. 2001) (noting that “factual challenges to a plaintiff’s complaint have no bearing on  
14 the legal sufficiency of the allegations”). Therefore, for the purpose of the motion, the court  
15 accepts as true all material allegations in the complaint and construes those allegations in the  
16 light most favorable to the non-moving party. *W. Shoshone Nat. Council v. United States*, 415  
17 F.Supp.2d 1201, 1204 (D.Nev., 2006). Dismissal is warranted only if it appears to a certainty  
18 that the plaintiff would not be entitled to relief under any set of facts that could be proven. *NL*  
19 *Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (citing *North Star Int’l v. Arizona Corp.*  
20 *Comm’n*, 720 F.2d 578, 580 (9th Cir. 1983)).

### 21 DISCUSSION

22 Defendant first argues that all claims should be dismissed because there is no statutory  
23 authorization for a suit to be brought against a department of the City of Reno. *See Fed. R. Civ.*  
24 *P. 17(b)* (providing that the capacity of an entity to be sued shall be determined by the law of the  
25 state in which the district court is held); *Wayment v. Holmes*, 912 P.2d 816, 819 (Nev. 1996)  
26 (noting that in the absence of statutory authorization, a department of a municipal government  
27 may not be sued). Plaintiff concurs with Defendant’s characterization, but seeks leave to amend  
28 pursuant to Federal Rule of Civil Procedure 15 in order to name the proper defendants to this

1 suit. Pl.'s Opp'n to Def.'s Mot. to Dismiss (#5) at 4.

2 Defendant then argues that Plaintiff has failed to sufficiently allege a hostile work  
3 environment under Title VII. A hostile workplace claim requires proof that: (1) the employee  
4 was subjected to verbal or physical conduct of a racial or sexual nature; (2) the conduct was  
5 unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the  
6 employee's employment and create an abusive work environment. *Vasquez v. County of Los*  
7 *Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). To determine whether conduct is sufficiently severe  
8 or pervasive to create an abusive work environment, courts look at the totality of the  
9 circumstances, "including the frequency of the discriminatory conduct; its severity; whether it is  
10 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably  
11 interferes with an employee's work performance." *Id.* (citing *Clark County Sch. Dist. v.*  
12 *Breedon*, 532 U.S. 268, 270-71 (2001)). The abusive environment must be recognizable both  
13 subjectively and objectively. *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000).

14 As noted above, at this stage in the proceedings, dismissal is warranted only if it appears  
15 to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be  
16 proven. The court has reviewed the allegations contained in the complaint and concludes that  
17 dismissal is not warranted at this stage. The court notes that Plaintiff has presented allegations of  
18 a pattern of false allegations and harassment, as well as departmental regulation violations, which  
19 occurred because of his status as a Native American. These allegations could produce facts  
20 which would show a subjectively and objectively abusive work environment if allowed to  
21 proceed. As such, Plaintiff has provided sufficient factual allegations to survive a motion to  
22 dismiss.

23 Under Federal Rule of Civil Procedure 15(a) a party may amend their pleadings by leave  
24 of court. Leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Here,  
25 Plaintiff has presented sufficient allegations to support a hostile work environment claim under  
26 Title VII but has not named a proper defendant. The court will therefore grant Plaintiff leave to  
27 amend his complaint to name a proper defendant.

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1 It is therefore ORDERED that Defendant's motion to dismiss (#4) is GRANTED in part  
2 and DENIED in part;

3 As Defendant is not subject to suit under Nevada law, all claims against Defendant are  
4 dismissed without prejudice. However, Plaintiff shall be granted leave to amend his complaint to  
5 name a proper defendant. Plaintiff shall have 20 days from the entry of this order to properly  
6 amend.

7 DATED this 8<sup>th</sup> day of December, 2006.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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